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No. 96-670

In The
Supreme Court of the United States
October Term, 1996

MURPHY J. FOSTER, JR., In His Official Capacity as Governor of Louisiana, and W. FOX McKEITHEN, In His Official Capacity as Secretary of State of Louisiana

Petitioners

vs.

G. SCOTT LOVE, PAUL S. BERGERON, KATHLEEN B. BALHOFF, and BENNIE BAKER-BOURGEOIS

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF PETITIONERS, MURPHY J. FOSTER, JR. IN HIS OFFICIAL CAPACITY AS GOVERNOR OF LOUISIANA, ET AL.

RICHARD P. IEYOUB
Attorney General of Louisiana
ROY A. MONGRUE, JR.
Assistant Attorney General
ANGIE ROGERS LAPLACE
Assistant Attorney General
LOUISIANA DEPARTMENT OF JUSTICE
Post Office Box 94005
Baton Rouge, Louisiana 70804-9005
(504) 342-7013
Counsel for Petitioners

QUESTION PRESENTED

This case involves an interpretation of the Constitution and laws of the United States as they pertain to the State of Louisiana's sovereign right to provide for the election of its members to the United States Congress and the extent, if any, to which Congress, in enacting 2 U.S.C. §§ 1 and 7, limited the authority of the States to provide for the manner of electing members to Congress. The specific question presented is whether the election system employed by the State of Louisiana to elect its members to the United States Congress conflicts with federal laws governing the time for holding congressional elections so as to render Louisiana's manner of conducting its congressional elections unenforceable under the Supremacy Clause; or whether the decision of the United States Court of Appeals for the Fifth Circuit constitutes an unnecessary and unwarranted abrogation of the authority specifically granted to the states by Article I, Section 4, Clause 1 of the United States Constitution to provide for the manner of electing members to Congress.

Actual parties to the proceeding in the United States District Court for the Middle District of Louisiana were:

(1) G. Scott Love, respondent herein,
(2) Paul S. Bergeron, respondent herein,
(3) Kathleen B. Balhoff, respondent herein,
(4) Bennie Baker-Bourgeois, respondent herein,
(5) Edwin W. Edwards, in his official capacity as Governor of the State of Louisiana,
(6) W. Fox McKeithen, in his official capacity as Secretary of State of Louisiana, petitioner herein.

Actual parties to the proceeding in the United States Court of Appeals for the Fifth Circuit were:

(1) G. Scott Love, respondent herein,
(2) Paul S. Bergeron, respondent herein,
(3) Kathleen B. Balhoff, respondent herein,
(4) Bennie Baker-Bourgeois, respondent herein,
(5) Murphy J. Foster, Jr, in his official capacity as Governor of the State of Louisiana, petitioner herein,
(6) W. Fox McKeithen, in his official capacity as Secretary of State of Louisiana, petitioner herein.

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BRIEF OF PETITIONERS, MURPHY J. FOSTER, JR. IN HIS OFFICIAL CAPACITY AS GOVERNOR OF LOUISIANA, ET AL.

◆

Murphy J. Foster, Jr., in his official capacity as Governor of the State of Louisiana, and W. Fox McKeithen, in his official capacity as Secretary of State of the State of Louisiana seek review of the decision of the United States Court of Appeals for the Fifth Circuit which declared that Louisiana's procedure for holding elections of its members to the United States Senate and House of Representatives, was in conflict with 2 U.S.C. §§1 and 7.

OPINIONS BELOW

The United States District Court for the Middle District of Louisiana's April 11, 1996 Ruling on Cross Motions for Summary Judgment, which denied the respondents' motion for summary judgment, granted the petitioners' motion for summary judgment and dismissed the respondents' suit for declaratory and injunctive relief, is unreported and appears in the Joint Appendix, J.A. 48. The U.S. Court of Appeals for the Fifth Circuit's July 30, 1996 opinion reversing the district court decision and thereby granting the respondents' claim for declaratory relief, is reported at 90 F.3d 1026 (5th Cir. 1996), and appears at J.A. 50. The Court of Appeals' opinion denying the petitioners' suggestion for rehearing is reported at 100 F.3d 413 (5th Cir. 1996) and appears at J.A. 73.

JURISDICTION

The decision of the U.S. Court of Appeals for the Fifth Circuit reversing the decision of the district court was entered on July 30, 1996. Petitioners filed their petition for Writ of Certiorari on October 28, 1996, within 90 days of July 30, 1996. This Court noted probable jurisdiction on March 17, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

United States Constitution, Article I, Section 4, Clause 1:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as the Places of choosing Senators.

United States Constitution, Article V, Clause 2:

> This constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

2 U.S.C. Section 1:

> At the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress, at which election a Representative to Congress is regularly by law to be chosen, a United States Senator from said state shall be elected by the people thereof for the term commencing on the 3d day of January next thereafter.

2 U.S.C. Section 7:

> The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in

each of the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter.

Louisiana Revised Statutes 18:1272:

§ 1272. United States senators, representatives in Congress; time of electing

A. All general elections for representatives in Congress, sometimes referred to in this Title as congressional elections, shall be held on the first Tuesday next following the first Monday in November, 1982, and every two years thereafter. The primary election shall be held on the first Saturday in October next preceding the date of the general election.

B. One United States senator shall be elected in the year 1980, and every six years thereafter, at the same time and at the same polling places as representatives in Congress. In the same manner, one United States senator shall be elected in the year 1978, and every six years thereafter.

Louisiana Revised Statute 18:401:

§ 401. Purpose and nature of primary and general elections

A. *Purpose.* Primary and general elections

are held to elect persons to Congress and to all the elective offices in this state, except the office of presidential elector.

B. *Nature.* All qualified voters of this state may vote on candidates for public office in primary and general elections without regard to the voter's party affiliation or lack of it, and all candidates for public office who qualify for a primary or general election may be voted on without regard to the candidate's party affiliation or lack of it.

Louisiana Revised Statute 18:402 (Appendix to Writ of Certiorari, Appendix D, pp. App.26- 31.)

Louisiana Revised Statute 18:511 (Appendix to Writ of Certiorari, Appendix D, pp. App 31- 33.)

STATEMENT OF THE CASE

In 1975, the Louisiana Legislature enacted Act 1 of the 1975 Regular Session instituting Louisiana's "open elections system". By its terms, Act 1 became effective on July 1, 1975 and received the necessary preclearance from the United States Justice Department pursuant to 42 U.S.C. §1973c. The provisions of Act 1 were subsequently incorporated into the Louisiana Election Code, R.S. 18:1 et seq., by Act 697 of 1976. That act also received the necessary Justice Department preclearance. The open elections system was first employed in elections for state offices in 1976, and in the congressional elections held in 1978. Since that time, the State of Louisiana has conducted all elections held to elect persons to Congress and to all the elective offices within the State, except the office of presidential elector, in accordance with the open elections system.

Louisiana employs its open elections systems for electing its United States Senators and Representatives as follows: (a) candidate qualifying is held prior to the primary election, in which all candidates for a particular seat, regardless of party affiliation, or lack thereof, file a notice of candidacy for that seat, so as to be placed on the ballot for the primary election (R.S. 18:401; R.S. 18:461); (b) if more than one candidate qualifies for a particular seat, a primary election is held on the first Saturday in October next preceding the date of the general election, in which all candidates for that congressional seat are placed on the ballot, regardless of party affiliation, or lack thereof (R.S. 18:402; R.S. 18:1272); and (c) a general election is held on the first Tuesday next following the first Monday in November (R.S. 18:402; R.S. 18:1272), in which the two candidates who received the highest number of votes in the primary election, regardless of party affiliation, or lack thereof, are placed on the ballot (R.S. 18:481). If one of the candidates receives a majority of the votes in the primary election, however, he is deemed elected (R.S. 18:511(A)). Louisiana's Election Code further provides that a candidate is deemed elected if he is the lone candidate to file a notice of candidacy for a particular seat (R.S. 18:511(B)).

Respondents, G. Scott Love, Paul S. Bergeron, Kathleen B. Balhoff, and Bennie Baker-Bourgeois instituted this suit in the United States District Court for the Middle District of Louisiana against Louisiana's Governor and Secretary of State, challenging the validity of the Louisiana open elections system as applied to congressional elections. They asserted that Louisiana's elections system conflicts with the provisions of 2 U.S.C. §§ 1 and 7 because in some instances, when a candidate for Congress receives a majority of the votes in the primary elec-

tion, no general election for that seat is held on the first Tuesday following the first Monday in November.

All parties to the litigation filed motions for summary judgment, which were heard before the District Court on October 23, 1995. On April 11, 1996, the District Court denied the respondents' motion for summary judgment and granted the petitioners' motion for summary judgment, finding that there were no genuine issues of material fact and that the petitioners were entitled to judgment as a matter of law. The District Court stated: "The Court specifically finds that Louisiana's method of conducting Congressional elections does not violate the laws and Constitution of the United States." J.A. 48.

Respondents appealed to the United States Court of Appeals for the Fifth Circuit. On July 30, 1996, a panel of the Fifth Circuit, by a 2-1 vote, reversed the decision of the District Court. The majority held that "plaintiffs are entitled to a declaratory judgment that Louisiana's election scheme conflicts with 2 U.S.C. §§ 1, 7 to the extent that the Louisiana scheme authorizes a contested election for members of Congress to be decided in the open primary before the uniform federal election day." 90 F.3d, at 1031, J.A. 60.. The court deferred instituting a remedy, but instead afforded the Louisiana Legislature an opportunity, until the end of the next regular legislative session in 1997, to enact a remedy in accordance with its decision. The matter was remanded to the District Court to reconsider plaintiffs' request for injunctive relief in the event the State did not enact a remedy within a reasonable time after the 1997 legislative session.

Petitioners filed a suggestion for Rehearing En Banc with the United States Court of Appeals for the Fifth Cir-

cuit on August 30, 1996. The Fifth Circuit denied the petitioners' request on November 15, 1996. J.A. 73.

SUMMARY OF THE ARGUMENT

Louisiana's open elections system comports with the requirements of federal law. Article I, Section 4, Clause 1 of the United States Constitution grants the states wide discretion in formulating a system for choosing their U.S. Senators and representatives. Congress enacted 2 U.S.C. §§1 and 7 establishing the first Tuesday next after the first Monday in November as the date on which states are to hold their elections for Congress. Louisiana, in enacting R.S. 18:1272, specifically followed the requirements of the federal statutes by designating the first Tuesday following the first Monday in November as the date for conducting the state's general elections for Congress, with the primary elections to be held on the first Saturday of October preceding the date of the general elections.

The appellate court erred in finding that Louisiana's open elections system conflicts with federal law. The court misinterpreted 2 U.S.C. §§ 1 and 7 to require states to hold contested elections for Congress on the first Tuesday next after the first Monday in November, even when, according to the manner selected by a state for choosing its members to Congress, only one candidate has qualified for the election to be held on that date.

There is no indication from the statutory language or in the legislative history that Congress, in enacting 2 U.S.C. §§1 and 7, intended to limit or otherwise affect the manner in which a state chooses to conduct its congressional elections generally, or specifically to require the states to change their method of qualifying candidates

for office so as to assure that contested congressional elections will always materialize on the first Tuesday next following the first Monday in November.

Rather than beginning with the assumption that Congress did not intend to displace state law, the appellate court instead interpreted the federal statutes in such a way as to assure a conflict with the state laws at issue.

The appellate court's interpretation of the federal statutes as preempting Louisiana's open elections law unnecessarily limits the ability of Louisiana to determine the manner in which it chooses its members to Congress. The appellate court's unreasonable and unsupported interpretation of the federal statutes constitutes an unwarranted intrusion upon the sovereign rights of the state of Louisiana as granted by Article I, Section 4, Clause 1 of the United States Constitution.

ARGUMENT

I. LOUISIANA'S OPEN ELECTIONS SYSTEM COMPORTS WITH THE REQUIREMENTS OF FEDERAL LAW

The United States Constitution, Article I, Section 4, Clause 1 requires each state to prescribe the times, places and manner of holding elections for senators and representatives, subject to specific regulations enacted by Congress. "The states are given, and in fact exercise, a wide discretion in the formulation of a system for the choice by the people of representatives." *United States v. Classic*, 313 U.S. 299 (1941): *Krasnoff v. Hardy*, 436 F.Supp. 304 (E.D.La.1977).

The State of Louisiana, in accordance with Article I, Section 4, Clause 1, enacted its open elections system as

its manner for electing its members to Congress. That system eliminated the use of multiple party primaries and subsequent general elections, and instead established a system that requires only one primary and one general election for electing members to Congress. In so doing, Louisiana tied its elections system to the federal laws regulating the time for holding congressional elections.

Congress enacted 2 U.S.C. §§1 and 7 pertinent to the time for holding congressional elections. 2 U.S.C. §1 provides:

> At the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress, at which election a Representative to Congress is regularly by law to be chosen, a United States Senator from said state shall be elected by the people thereof for the term commencing on the 3d day of January next thereafter.

2 U.S.C. §7 provides:

> The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter.

In compliance with 2 U.S.C. §§ 1 and 7, Louisiana enacted LSA-R.S.18:1272:

> § 1272. United States senators, representatives in Congress; time of electing
>
> A. All general elections for representatives in Congress, sometimes referred to in this Title as congressional elections, shall be held on the first Tuesday next following the first Monday in November, 1982, and every two years thereafter. The primary election shall be held on the first Saturday in October next preceding the date of the general election.
>
> B. One United States senator shall be elected in the year 1980, and every six years thereafter, at the same time and at the same polling places as representatives in Congress. In the same manner, one United States senator shall be elected in the year 1978, and every six years thereafter.

These federal and state statutes, when read together, give a clear indication that the State of Louisiana enacted its laws regulating the manner of conducting congressional elections so as to comply with the federal laws regulating the times for holding the elections. The federal statutes provide for elections on the first Tuesday following the first Monday in November. Louisiana's law mirrors the federal law, providing that the general election for Congress be conducted on the first Tuesday following the first Monday in November.

Prior to 1978, Louisiana elected its members to Con-

gress through an election process in which partisan primaries were held in the summer months of the election year, followed by a general election held on the first Tuesday following the first Monday in November.[1] In actual practice, the partisan primaries were usually limited to a Democratic Party first and second primary (if no one candidate received a majority of the votes in the first primary) followed by a general election in which independent and/or other party candidates, if any, would be placed on the ballot along with the Democratic Party primary winner. More often than not, the winner of the Democratic Party primary was unopposed in the general election. As noted by Judge Dennis in his dissenting opinion:

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1. Prior to the adoption of the open elections system, Louisiana held its partisan first primaries in either late July or early August, with the second primary held six weeks later and the general election, if necessary, on the first Tuesday following the first Monday in November. See, e.g. R.S. 18:299, enacted by Act 15 of the 1966 Louisiana Legislature:

> "After January 1, 1965, in any year in which a United States Senator is to be elected at the same time that the members of the House of Representatives in the Congress of the United States are to be elected, as provided by the laws of this state, the state central committees of the parties coming under the provisions of this part shall meet on the second Friday in June preceding the congressional election and issue a call for a primary to nominate a candidate for the United States Senate. The date for the holding of said primary shall be the second Saturday following the first Monday in August after the date of the meeting of the state central committee. If a candidate fails to receive a majority of the votes cast for the office for which he was a candidate, a second primary shall be held at the same places as the first primary and said second primary shall be six weeks from the date of the first primary...."

> [D]uring the last decade of the old regime, out of a total of 44 Senatorial and Representative elections only 20 resulted in contested elections on the general election day. *See*, Louisiana Almanac 1995-1996, p. 458-459. During its entire existence, the party primary system probably resulted proportionately in even fewer actual contests on the federal election day. In *United States v. Classic*, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941) the Court observed:
>
> > Pursuant to the authority given by § 2 of Article I of the Constitution, and subject to the legislative power of Congress under § 4 of Article I, and other pertinent provisions of the Constitution, the states are given, and in fact exercise a wide discretion in the formulation of a system for the choice by the people of representatives in Congress. In common with many other states Louisiana has exercised that discretion by setting up machinery for the effective choice of party candidates for representative in Congress by primary elections and by its laws it eliminates or seriously restricts the candidacy at the general election of all those who are defeated in the primary.

* * *

> [T]he practical operation of the primary law in otherwise excluding from the ballot on the general election the names of candidates rejected at the primary is such as to impose serious restrictions upon the choice of candidates by the voters save by voting at the primary election. In fact, as alleged in the indictment, the practical operation of the primary in Louisiana, is and has been since the primary election was established in 1900 to secure the election of the Democratic primary nominee for the Second Congressional District of Louisiana.
>
> * * *
>
> Here, even apart from the circumstance that the Louisiana primary is made by law an integral part of the procedure of choice, the right to choose a representative is in fact controlled by the primary because, as is alleged in the indictment, the choice of candidates at the Democratic primary determines the choice of the elected representative.

J.A. 68-70.

Louisiana now elects its members to Congress in a manner different from other states. Louisiana has eliminated partisan primary elections, and thereby decreased to a maximum of two the number of elections potentially

held in order to elect a member to Congress. In other states, partisan primary elections are conducted prior to the date proscribed in 2 U.S.C. §§1 and 7, and the general election is then subsequently held on that date.[2] Under Louisiana's open elections system, the general election for Congress is also held on the Tuesday next following the first Monday in November, with the primary election held on the first Saturday in October prior thereto.

Congress is authorized by the Constitution to alter or change the time, place and manner the States have chosen to conduct federal elections. In enacting 2 U.S.C. §§ 1 and 7, Congress sought only to alter the time in which elections were conducted, not their manner. There is no indication that Congress attempted to preempt Louisiana from instituting the manner it has chosen for its congressional elections. The scant legislative history of the federal legislation suggests that its purpose was to limit the number of elections so as to decrease the number of trips voters must make to the polls, and to prevent the states from manipulating the timing of congressional elections for political advantage. Louisiana's open elections system satisfies both of these objectives, perhaps better than most other systems utilized throughout the country. First, under Louisiana's system the maximum trips to the polls necessary for voters to elect members to

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2. Primary elections for Congress are held at varying times by the different states. For example, in 1994 Texas held the earliest elections, with its first (partisan) primary elections on March 8th and second primary elections on April 12. Illinois also holds its primary elections in March, while numerous other states hold their primaries in May and June of the election year. *See, Federal Elections 94, Elections Results for the U.S. Senate and U.S. House of Representatives*, Federal Election Commission, 1995.

Congress is two, less than in other states that conduct first and second partisan primaries in addition to the general election (and in some states a second "general" election may be necessary where there is a "failure to elect" on the day designated by 2 U.S.C. §§1 and 7.)[3] Second, Louisiana's scheme does not allow for the manipulation of either the general or primary election dates. Louisiana's law specifically provides that the general election is held on the first Tuesday following the first Monday in November, and the primary is normally to be held on the first Saturday in October immediately prior to the general election.[4]

II. THE APPELLATE COURT ERRED IN ITS APPLICATION OF THE SUPREMACY CLAUSE DOCTRINE

This Court's jurisprudence under the Supremacy Clause has established a doctrine of preemption for deciding when a state law or constitution conflicts with the Constitution, laws or treaties of the United States, such that the state law must yield to the federal provision. In *Northwest Central Pipeline Corporation v. State Corporation,*

3. 2 U.S.C. §8 provides:

> The time for holding elections in any State, District, or Territory for a Representative or Delegate to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several States and Territories respectively.

See, e.g., *Public Citizen v. Miller*, 813 F.Supp. 821 (N.D.Ga.1993), aff'd, 992 F.2d 1548 (11th Cir.1993); and *Busbee v. Smith*, 549 F.Supp. 494 (D.D.C.1982), aff'd, 459 U.S. 1166 (1983).

4. In accordance with R.S. 18:402(G), the 1996 primary election ordinarily held on the first Saturday in October was held two weeks earlier, on September 21, 1996, due to conflicts with religious holidays.

Commission of Kansas, 489 U.S. 493, 509 (1989), the court stated:

> Congress has the power under the Supremacy Clause of Article VI of the Constitution to preempt state law. Determining whether it has exercised this power requires that we examine congressional intent. In the absence of explicit statutory language signaling an intent to preempt, we infer such intent where Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947), or where the state law at issue conflicts with federal law, either because it is impossible to comply with both, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217-1218, 10 L.Ed.2d 248 (1963), or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives, *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941). See *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299-300, 108 S.Ct. 1145, 1150-1151, 99 L.Ed.2d 316 (1988); *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 368-369, 106 S.Ct. 1890, 1898-1899, 90 L.Ed.2d 369 (1986); *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 203-204, 103 S.Ct. 1713, 1721-1722, 75 L.Ed.2d 752 (1983).

The instant appellate court ruled that, under this Court's preemption doctrine, Louisiana's election law was preempted by 2 U.S.C. §§ 1 and 7. The appellate court did not base its decision on a finding that the federal law contained explicit statutory language signaling an intent to preempt, nor did it find that Congress has legislated comprehensively in this area such as to occupy the entire field of regulation, leaving no room for the States to supplement the federal law. Rather, the appellate court stated as its reasons for finding preemption that Louisiana's law "conflicts with the federal statutes that establish a uniform federal election day and thwarts the congressional purpose of establishing a uniform day to prevent earlier elections from influencing later voters." 90 F.3d, at 1031.

In applying preemption analysis, the court should have started with the assumption that Congress did not intend to displace state law, *Maryland v. Louisiana*, 451 U.S. 725 (1981), and evaluated, in that light, whether the state law stands as an obstacle to accomplishing the objectives of Congress.

Instead, the appellate court decision erroneously interpreted the federal law so as to create a conflict between the federal and state legislation where none exists. As discussed above, Louisiana's law tracks the language of the federal statutes in establishing the "uniform federal election day" as the date for the general elections for Congress. The appellate court, however, incorrectly interpreted the federal legislation to require that a state must hold contested elections on the first Tuesday following the first Monday in November. The court's interpretation is unsupported by the legislative history, as shown by Judge Dennis in his dissent:

In order to demonstrate that it is impossible to harmonize or to comply with both the state and federal laws the plaintiffs advance an esoteric interpretation of the federal statutes that is not supported by either the scant legislative history or the previous judicial understanding of those laws and the Constitution. They argue that it was the congressional intent in enacting the predecessor to 2 U.S.C. §§ 7 and 8 to require each state to adopt regulations for electing Representatives that would always result in a contested election for each seat on the federal election day, or at least guarantee that there would be an opportunity for a candidate to qualify for one. Therefore, they contend that the state's open primary and general election laws are totally incompatible with the federal law because they have failed more often than not to produce contested elections for Representatives on the federal election day.

The meager legislative history tends to show a congressional aim to establish the federal election day as a center of gravity to prevent the calendrical dispersion of independent state congressional elections. *But it does not indicate an intention to prevent variation among the states in the manner of election so long as each election scheme relates to the federal election day by using it either as the primary or general congressional election day.* The few remarks by Senators Butler and Thurman express concern over each

state's autonomous power to carry out completely independent elections of Representatives and Presidential electors in any month of the year. They feared that under such an undisciplined regime there would be undue influence upon outcomes by strategic timing of elections and the lack of any semblance of uniformity. However, their remarks evince no concern over the fact that primaries closely linked to the proposed federal election day might fail to materialize into contested elections on the Tuesday next after the first Monday in November. From the sparse legislative history one can only infer a legislative objective of rough uniformity by tethering each state's congressional election scheme to the federal election day; the congressional record does not reflect an overweening desire for contested Representative elections in each district on every federal election day.

J.A. 66-67 (citations omitted)(emphasis added).

The appellate court's own comments concerning Louisiana's pre-1978 election system also betrays its interpretation of the federal statutes. As discussed earlier, prior to 1978, Louisiana elected its members to Congress by way of partisan primary elections, followed by a general election held on the first Tuesday after the first Monday in November. Although under that system the general elections were more often than not uncontested, the appellate court concluded that the pre-1978 system complied with the federal election day statutes stating:

Before 1978, Louisiana's election system

for selection of representatives and senators complied with the federal election day statutes. The pre-1978 law required recognized political parties to nominate candidates through partisan primaries. The parties' nominees for Congress would then appear on the ballot on federal election day. Independent candidates and others who wished to appear on the federal election day ballot with the party nominees were required to qualify by other methods. The names of all qualified candidates were placed on the federal election day ballot. The candidate who received the most votes in this election was declared the winner. See La. Rev.Stat. §18:546 (now repealed)

90 F.3d, at 1030. J.A. 56.

The court reached this conclusion even though the open elections system did not change the one aspect of the law that 2 U.S.C. §§1 and 7 address, the time for holding the general election. Although Congress is authorized by the Constitution to alter or change the time, place and manner the States have chosen to conduct federal elections in enacting 2 U.S.C. §§1 and 7, Congress sought only to alter the time in which elections were conducted, not their manner. Conversely, the open elections system did not change the timing of the general election for Congress. It changed the manner by which a candidate qualifies for the general election, limiting it to the two candidates who received the most votes in the primary election, unless one candidate received a majority of the vote, in which instance only that candidate would qualify for the general election, and thereby be elected.

The only practical distinction in the uncontested general election procedure under the old law, was that an unopposed candidate's name would be placed on the general election day's ballot, clearly a distinction without a difference.

Rather than attempting to interpret the state and federal laws reasonably so as to avoid a conflict, the appellate court, after first interpreting the federal statutes so as to create a conflict, then did likewise to the state law provisions. The court stated:

> Appellees assert that the purpose of the primary election is to qualify candidates to appear on the November ballot. They argue that when one candidate receives a majority of the votes in the primary, only one candidate qualifies and the state is not required to place the single qualified candidate on the November ballot. We disagree. The state's argument that the actual election occurs on the federal election day is refuted by the language of the Louisiana Election Code which states that "[a] candidate who receives a majority of the votes cast for an office in a primary election *is elected.*" La.R.S. §18:511(A)(emphasis in original).

90 F.3d, at 1031. J.A. 58.

The appellate court's interpretation of R.S.18:511(A) is incorrect and directly contradictory to the specific terms of R.S. 18:481[5], which specifically provide that the

5. R.S. 18:481 provides as follows:
> The candidates who qualify for each office remaining to be filled in the general election are those who received the two highest number of votes, the four highest number of votes, and so on among those not elected in the primary election, until the maximum number of candidates for each office of the general election ballot is reached.

purpose of the primary election is to qualify candidates for the general election. The sentence in R.S. 18:511(A) cited by the appellate court serves merely the function of keeping the name of an unopposed candidate off of the ballot and to acknowledge the obvious fact that an unopposed candidate is elected to office.

A similar provision appears in R.S.18:511(B) pertaining to candidates who are unopposed at the close of qualifying for the primary election. See Appendix to J.S., at App.32. It provides that when only one candidate files a notice of candidacy for a particular office, he is declared elected, and his or her name is not to appear on the ballot in either the primary or general election. Under the appellate court's reasoning, that provision of Louisiana law also conflicts with the federal laws, and suggests the absurd result that if Louisiana must hold a contested election on the first Tuesday following the first Monday in November even if only one candidate qualifies for the general election by receiving a majority of the votes cast in the primary, Louisiana must also hold a contested election on the date designated by the federal legislation, even when only one candidate files a notice of candidacy.

III. THE APPELLATE COURT DECISION IS AN UNNECESSARY AND UNWARRANTED INTRUSION UPON THE STATE'S SOVEREIGNTY

The appellate court decision unnecessarily intrudes upon the sovereign right of the State of Louisiana to de-

termine the manner in which it elects its representatives and senators to Congress, by needlessly and erroneously finding a conflict between the federal and state laws, when none actually exists. "It is not . . . a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a preexisting right of (state) sovereignty." The Federalist No. 32, p. 243 (B. Wright ed. 1961). *Goldstein v. California*, 412 U.S. 546 (1973). Each sovereign possesses equal regulatory power as the federal government, subject only to the independent operation of the Supremacy Clause.

Given the importance of the state's right to exercise discretion in the formulation of a system of electing its representatives and senators to Congress, *United States v. Classic*, 313 U.S. 299 (1941), the appellate court's decision invalidating Louisiana's open elections system as it pertains to congressional elections constitutes a serious invasion to the sovereignty of the State of Louisiana. The appellate court decision is an affront to the rights of the states to determine how to conduct their congressional elections, particularly as here, where the state and federal laws at issue can reasonably be interpreted as acting in concert, rather than in conflict.

Louisiana is entitled to exercise its sovereign power to establish the manner of electing its representatives and senators for Congress. The Constitution vests each state legislature with the "authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns ..." *Smiley v. Holm*, 285 U.S. 355, 366

(1932); See also, *Roudebush v. Hartke*, 405 U.S. 15, 24-25 (1972), and *Storer v. Brown*, 415 U.S. 724, 730 (1974).

The legislative history does not substantiate that Congress, by enacting 2 U.S.C. §§1 and 7, intended to limit the states' ability to determine the manner in which they conduct their congressional elections. As discussed above, the limited goals of the federal legislation, i.e., prevention of manipulation of the election process for political purposes and the elimination of multiple federal elections, is not frustrated by operation of Louisiana's election laws. In fact, the concerns addressed by the members of Congress in 1870 obviously arose from the party primary system, utilized at that time by most states. Louisiana's system is clearly less offensive to these articulated congressional goals than are the election systems employed by many states today, where multiple party elections are held in varying months before the general elections,[6] and in which voters in some states may venture to the polls three, and possibly four times to cast their ballots in congressional elections.

The appellate court's decision, finding a conflict between the federal statutes, and Louisiana's election laws that track the very language and further the purposes of the federal statutes, requires reversal by this Honorable Court.

CONCLUSION

According to the United States Constitution, the manner by which a state elects its members to Congress is for the state to determine, unless and until Congress provides otherwise. The sovereign powers of the states are thereby implicated whenever a challenge is mounted

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6. See footnote 2, supra.

to the manner proscribed by the states for holding congressional elections. The appellate court decision in this matter erroneously interpreted the federal statutory provisions pertinent to congressional elections so as to limit the states' authority to provide for the manner in which states conduct their congressional elections. If sustained, the appellate court unnecessarily will prohibit the state of Louisiana from exercising its sovereign powers to determine on its own, through its own governmental processes, the method of electing its representatives to the United States Congress.

Respectfully submitted,

RICHARD P. IEYOUB
Attorney General of Louisiana

ROY A. MONGRUE, JR.
Assistant Attorney General

ANGIE ROGERS LAPLACE
Assistant Attorney General

LOUISIANA DEPARTMENT OF JUSTICE
One American Place, 6th Floor
301 Main Street
P.O. Box 94005
Baton Rouge, Louisiana 70804
(504) 342-7013

Counsel for Petitioners